

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Oct 05, 2020

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

OKANOGAN HIGHLANDS
ALLIANCE, and STATE OF
WASHINGTON,

Plaintiff,

v.

CROWN RESOURCES
CORPORATION and KINROSS
GOLD, USA, INC.,

Defendants.

NO: 2:20-CV-147-RMP

ORDER DENYING DEFENDANTS'
MOTION TO DISMISS

BEFORE THE COURT is Defendants' Motion to Dismiss for lack of subject matter jurisdiction and failure to state a claim, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). ECF No. 18. A hearing took place on September 24, 2020, via video conference. Paul A. Kampmeier appeared on behalf of Plaintiff Okanogan Highlands Alliance; Kelly T. Wood appeared on behalf of Plaintiff State of Washington; and Jonathan W. Rauchway appeared on behalf of all Defendants. The

1 Court has reviewed the pleadings, heard oral argument from the parties, and is fully
2 informed.

3 BACKGROUND

4 Defendants, Kinross Gold USA, Inc., and its subsidiary, Crown Resource
5 Corporation, own and operate Buckhorn Mountain Mine (the “Mine”) in Okanogan
6 County, Washington. ECF No. 1 at 13. In 2014, Crown Resources obtained a
7 National Pollutant Discharge Elimination System (“NPDES”) permit issued by the
8 Washington State Department of Ecology (“Ecology”). ECF No. 1 at 14. The
9 NPDES permit authorizes its holder to discharge pollutants to waters of the state
10 provided that the permit holder complies with various terms and conditions. *See* 33
11 U.S.C. § 1342.

12 Defendants’ NPDES permit has purportedly been modified twice since being
13 issued. ECF No. 1 at 14. The Second Modified NPDES permit is allegedly still in
14 effect after it was administratively extended beyond the February 28, 2019
15 expiration date. *Id.* The Second Modified NPDES permit allegedly requires Crown
16 to capture and treat all water at the [Buckhorn], meet certain numeric effluent
17 limitations at water quality monitoring points, maintain a “capture zone” beyond
18 which mine-generated pollutants are not permitted to travel, and to adhere to “related
19 monitoring, reporting, and adaptive management requirements.” *Id.* at 15; *see* 33
20 U.S.C. §§ 1342; 1365(f).

1 Plaintiffs, Okanogan Highlands Alliance (“Okanogan Highlands”) and the
2 State of Washington (“State”), by and through the Attorney General, allege
3 Defendants have violated several terms of the permit and polluted local waters
4 continuously since 2014. *See* ECF No. 1 at 2; State Complaint at 9–10. Although
5 active mining ceased in 2017, Plaintiffs allege that Defendants continue reclamation
6 efforts and are still discharging pollutants to ground and surface waters surrounding
7 the Mine. ECF No. 1 at 3, 5–6; State Complaint at 9–10. Plaintiffs claim that
8 Defendants have violated the terms of their NPDES permit in the following ways: by
9 discharging pollutants in excess of average monthly effluent limitations; failing to
10 maintain capture zones for mine-impacted water; failing to follow permit
11 requirements after exceeding discharge limits; failing to abide by reporting
12 requirements; failing to notify Ecology of its intent to dismantle the prior Mine
13 Water Treatment Plant; and failing to submit and implement a plan before
14 dismantling the prior Mine Water Treatment Plant. ECF No. 1 at 16–28; State
15 Complaint at 12–18.¹

16 Pursuant to the notice requirements set forth in 33 U.S.C. § 1365(b)(1)(A),
17 Okanogan Highlands notified Defendants of its intent to sue under the Clean Water
18 Act on January 31, 2020. ECF No. 1 at 32. Okanogan Highlands filed suit on April
19

20 ¹ The State Complaint in this matter is filed in 2:20-cv-00170-RMP. Hereinafter
21 referred to as “State Complaint.”

1 10, 2020. ECF No. 1. The State notified Defendants of its intent to sue under the
 2 Act on March 5, 2020. State Complaint at 1-1. The State filed suit on May 7, 2020.
 3 *Id.* The parties stipulated to consolidate the suits on June 25, 2020. ECF No. 11.

4 **LEGAL STANDARD**

5 Under Fed. R. Civ. P. 12(b)(1), a defendant may move to dismiss and facially
 6 or factually challenge the existence of subject matter jurisdiction. *White v. Lee*, 227
 7 F.3d 1214, 1242 (9th Cir. 2000).

8 Dismissal of a complaint is proper under Fed. R. Civ. P. 12(b)(6) where the
 9 plaintiff fails to state a claim upon which relief can be granted. A motion to dismiss
 10 brought pursuant to this rule “tests the legal sufficiency of a claim.” *Navarro v.*
 11 *Block*, 250 F.3d 729, 732 (9th Cir. 2001). In reviewing the sufficiency of a
 12 complaint, a court accepts all well-pleaded allegations of material fact as true and
 13 construes those allegations in the light most favorable to the non-moving party.
 14 *Daniels-Hall v. Nat’l Educ. Ass’n.*, 629 F.3d 992, 998 (9th Cir. 2010) (citation
 15 omitted). To withstand dismissal, a complaint must contain “enough facts to state a
 16 claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S.
 17 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual
 18 content that allows the court to draw the reasonable inference that the defendant is
 19 liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

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21 / / /

DISCUSSION

The Clean Water Act, 33 U.S.C. §§ 1251–1376, aims to restore and maintain the “chemical, physical and biological integrity of [the] Nation’s waters.”

33 U.S.C. § 1251(a). To achieve these goals, the Act “establishes a comprehensive statutory system for controlling water pollution.” *Ass’n to Protect Hammersley v. Taylor Res.*, 299 F.3d 1007, 1009 (9th Cir. 2002) (citation omitted). This system includes the use of NPDES permits “for regulating discharges of pollutants into waters of the United States.” *Id.* In Washington State, Ecology is authorized to administer the Clean Water Act’s NPDES program. *Id.* at 1009–10.

The Clean Water Act explicitly allows private citizens to bring civil suits pursuant to 33 U.S.C. § 1365(a)(1) to enforce “effluent standards or limitations.” “Effluent standards or limitations” includes the unlawful discharge of pollutants, pursuant to 33 U.S.C. § 1311(a), as well as any condition of a permit issued under § 1342 that is in effect. *See* 33 U.S.C. § 1365(f)(1).

For a successful claim under the Act, a citizen plaintiff must prove ongoing violations, which can be done “either (1) by proving violations that continue on or after the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations.” *Chesapeake Bay Foundation v. Gwaltney*, 844 F.2d 170, 171–72 (4th Cir.1988), *on remand from* 484 U.S. 49 (1987). “Intermittent or sporadic violations do not cease to be ongoing until the date when there is no real

1 likelihood of repetition.” *Sierra Club*, 853 F.2d at 671 (quoting *Chesapeake Bay*
2 *Found. v. Gwaltney*, 844 F.2d 170, 171–72 (4th Cir. 1988)).

3 If the defendant wishes to argue that the allegations are untrue, the defendant
4 must move for summary judgment. *See Gwaltney*, 484 U.S. at 66. Here, Defendants
5 moved for dismissal under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), and not for
6 summary judgment. *See Sierra Club*, 853 F.2d at 669. Thus, the Court analyzes
7 Defendants’ facial challenges to Plaintiffs’ Complaints accordingly.

8 **I. Defendants’ Facial Attack on Jurisdiction Fails**

9 Defendants attack the Court’s jurisdiction, arguing that Plaintiffs only allege
10 “wholly past” violations of the federal Clean Water Act rather than ongoing
11 violations. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*,
12 484 U.S. 49, 64 (1987) (concluding that provision of Clean Water Act does not
13 confer federal jurisdiction over citizen suits for violations that are “wholly past”).

14 “To invoke federal jurisdiction under section 505(a) of the Clean Water Act, a
15 citizen plaintiff must allege ‘a state of either continuous or intermittent violation—
16 that is, a reasonable likelihood that a past polluter will continue to pollute in the
17 future.’” *Sierra Club v. Union Oil Co. of California*, 853 F.2d 667, 671 (9th Cir.
18 1988) (quoting *Gwaltney v. Chesapeake Bay Found.*, 484 U.S. 49, 57 (1987)). “The
19 citizen plaintiff need not prove the allegations of ongoing noncompliance before
20 jurisdiction attaches.” *Sierra Club*, 853 F.2d at 669. Rather, the pleading standard
21 is minimal: “the citizen plaintiff’s allegations must be based on good-faith beliefs,

1 ‘formed after reasonably inquiry,’ that are ‘well-grounded in fact.’” *Id.* (quoting
2 Fed. R. Civ. P. 11).

3 Plaintiffs allege not only past violations by Defendants, but continuing
4 violations as well. Okanogan Highlands alleges that its interests “have been, are
5 being, and will be adversely affected by Defendants’ Clean Water Act and NPDES
6 permit violations.” ECF No. 1 at 6; *see also Sierra Club*, 853 F.3d at 670–71
7 (finding district court properly assumed jurisdiction over Clean Water Act citizen-
8 suit and quoting plaintiff’s complaint with nearly identical language in support).
9 These alleged violations include Defendants’ failure to maintain the “capture zone,”
10 which has purportedly occurred every day for the last five years. ECF No. 1 at 37;
11 State Complaint at 14. Plaintiffs further allege an ongoing pattern of frequent
12 noncompliance with the permit’s reporting requirements. *See* ECF No. 1 at 21–23;
13 State Complaint at 16–17. In support of these allegations, Plaintiffs contend that
14 Defendants continue to own and operate the Mine; Defendants still hold an NPDES
15 permit and are subject to its requirements; and Defendants continue to discharge
16 pollutants to surrounding waters around the Mine. ECF No. 1 at 7, 13–14, 149;
17 State Complaint at 7, 9, 11.

18 Therefore, Plaintiffs’ allegations of continuing violations committed by
19 Defendants appear to be based on good-faith beliefs, “formed after reasonably
20 inquiry,” that are “well-grounded in fact,” thereby meeting the low threshold set
21

1 forth in Fed. R. Civ. P. 11. The court may properly assume jurisdiction over
2 Plaintiffs' claims under the Act. Accordingly, Defendants' facial attack fails.

3 **II. Defendants' Factual Attack on Jurisdiction also Fails**

4 In resolving a factual attack on jurisdiction, courts may consider evidence
5 beyond the complaint; however, jurisdictional findings are inappropriate where the
6 jurisdictional issue is intertwined with the merits of a claim. *See Safe Air for*
7 *Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). The question of
8 jurisdiction and the merits are intertwined "where a statute provides the basis for
9 both the subject matter jurisdiction of the federal court and the plaintiff's substantive
10 claim for relief." *Id.* (quoting *Sun Valley Gas., Inc. v. Ernst Enters.*, 711 F.2d 138,
11 140 (9th Cir. 1983)); *see, e.g., Waste Action Project v. Fruhling Sand & Topsoil*
12 *Inc.*, 737 Fed. Appx. 344, 345 (9th Cir. 2018) (reversing dismissal on jurisdictional
13 grounds because "the Clean Water Act . . . provides both federal subject matter
14 jurisdiction and a claim for relief where a person is 'alleged to be in violation' of its
15 [NPDES] permit").

16 Where the jurisdictional and substantive issues are so intertwined, dismissal
17 on jurisdictional grounds is only warranted "where the alleged claim under . . .
18 federal statutes clearly appears to be immaterial and made solely for the purpose of
19 obtaining federal jurisdiction or where such claim is wholly insubstantial and
20 frivolous." *Safe Air for Everyone*, 373 F.3d at 1039 (quoting *Bell v. Hood*, 327 U.S.
21 678, 682–83 (1946)).

1 Here, as decided in *Waste Action Project*, the Clean Water Act provides both
2 federal subject matter jurisdiction and a claim for relief where a defendant is alleged
3 to be in violation of its NPDES permit. *See Waste Action Project*, 737 Fed. Appx. at
4 345. Because jurisdiction and the merits are intertwined, resolving a factual attack
5 on jurisdiction is inappropriate here. *See Safe Air for Everyone*, 373 F.3d at 1039.
6 Moreover, Plaintiffs’ claims under the federal Clean Water Act are not immaterial,
7 insubstantial, or frivolous on their face such that they defeat subject matter
8 jurisdiction. *See Bell*, 327 U.S. at 682–83.

9 Federal courts can also lose jurisdiction over citizen suits when the defendant
10 can show that the case is moot. *See id.* at 66. To prove a case is moot, the
11 defendant must show that “there is no reasonable expectation that the wrong will be
12 repeated.” *Id.* The defendant must demonstrate that it is “absolutely clear that the
13 allegedly wrongful behavior could not reasonably be expected to recur.” *United*
14 *States v. Phosphate Export Ass’n., Inc.*, 393 U.S. 199, 203 (1968).

15 Here, Defendants challenge the ongoing nature of a certain subset of
16 violations, namely trigger level exceedances and the dismantling of a water
17 treatment plant at the Mine. However, Defendants have yet to show that those
18 wrongs, as well as the other violations alleged by Plaintiffs, have been completely
19 eradicated at the Mine so as to render the case moot at this juncture.

20 Therefore, Defendants’ factual attack on jurisdiction also fails.
21

1 **III. Plaintiffs Sufficiently State a Claim under the Clean Water Act**

2 Defendants argue Plaintiffs' federal claims should be dismissed for failure to
3 state a claim because the alleged violations are "wholly past" and "wholly past"
4 violations are insufficient to state a cognizable claim under the Clean Water Act.
5 ECF No. 18 at 9–12. For a cognizable claim under the Act, 33 U.S.C. § 1365(a)(1),
6 plaintiffs must prove continuous or intermittent violation[s] of an "effluent standard
7 or limitation." As noted above, an "effluent standard or limitation" encompasses
8 restrictions on discharging pollutants, as well as any condition of a permit issued
9 under § 1342 that is in effect. *See* 33 U.S.C. § 1365(f).

10 Okanogan Highlands alleges various violations of "effluent standards or
11 limitations." *See* ECF No. 1 at 16–28; *see also* ECF No. 1 at 43–150 ("Appendix
12 A") (purportedly identifying Defendants' violations of the NPDES Permit's average
13 monthly numeric effluent limitations during the monitoring periods from January
14 2015 to December 2019). In support of its claim under the Clean Water Act,
15 Okanogan Highlands plead the following factual allegations: Defendants own and
16 operate the Buckhorn Mountain Mine; surface facilities remain on-site and
17 operational; Defendants hold an NPDES permit still in effect; Defendants continue
18 to discharge pollutants and stormwater to ground waters connected to the United
19 States; and the permit requires Defendants to "capture and treat mine generated
20 contaminated groundwater and industrial stormwater," which Defendants have failed
21 to do, thereby causing water outside the "capture zone" to exceed effluent limits

1 established by the permit. *See* ECF No. 1 at 13–18. Taking these factual allegations
2 in the complaint as true for the purpose of this motion, Okanogan Highlands has
3 sufficiently stated a claim under the Clean Water Act.

4 The State’s Complaint alleges that “Defendants have consistently disregarded
5 the obligations of its NPDES permit . . . adversely affect[ing] Washington and its
6 residents by contaminating numerous waters” and that these violations are ongoing.
7 State Complaint at 2, 14; *see also* State Complaint 1-1 (Notice of Intent to Sue). In
8 support of its claim under the Clean Water Act, the State’s Complaint sets forth the
9 following factual allegations: from construction to present day, Defendants
10 discharge pollutants around the site; Defendants are required to meet average
11 monthly numeric effluent limitations and exceed these limits; and the monitoring
12 results from surrounding waters show that contaminants from the Mine have
13 consistently escaped the required “capture zone.” *See* State Complaint at 9, 13–14.
14 Taking these factual allegations in the complaint as true for the purposes of this
15 motion, the State has sufficiently stated a claim under the Clean Water Act.

16 The NPDES permit also includes reporting requirements which Plaintiffs
17 allege are repeatedly ignored by Defendants. *See* ECF No. 1 at 21–23; State
18 Complaint at 16–17. Although allegations of reporting violations that are “wholly
19 past” alone are not sufficient to support a claim under the Act, “it is an entirely
20 different situation where past reporting violations [are] alleged in support of the
21 contention that a defendant was engaged in a pattern of non-compliance with

1 applicable reporting requirements.” *Atwell v. KW Plastics Recycling Div.*, 173
2 F.Supp.2d 1213, 1228, n. 15 (M.D. Ala. 2001) (distinguishable because plaintiff did
3 not allege that defendant “engaged in a pattern or practice of failing to report its
4 monitoring results”).

5 Plaintiffs claim that Defendants’ repeated failures to report and take corrective
6 action are part of a systematic pattern of noncompliance. In support of this alleged
7 pattern, Plaintiffs contend that Defendants have repeatedly failed to report trigger
8 exceedances, failures of the groundwater “capture zone,” and did not submit and
9 implement a plan before dismantling the prior treatment plant. ECF No. 1 at 21–23;
10 State Complaint at 16–18. In addition, Okanogan Highlands alleges that there has
11 been no turnover in the personnel who are responsible with ensuring Defendants’
12 environmental compliance. ECF No. 1 at 26–27.

13 The Court concludes that Plaintiffs have sufficiently plead continuous or
14 intermittent violations of “effluent standard[s] or limitation[s]” committed by
15 Defendants to state a claim under the Clean Water Act and avoid dismissal.
16 Accordingly, Defendants’ Motion to Dismiss for failure to state a claim is denied.

17 **IV. The Attorney General has the Authority to Sue**

18 Defendants argue that the State’s claims arising under the Washington
19 Water Pollution Control Act, Chapter 90.49 RCW, also should be dismissed because
20 the Attorney General has no authority to seek declaratory relief on behalf of the
21 State; he may only act as an attorney for the Department of Ecology.

1 Pursuant to RCW 90.48.037:

2 [T]he department with the assistance of the attorney general, is
3 authorized to bring any appropriate action at law or in equity, including
4 action for injunctive relief, in the name of the people of the state of
Washington as may be necessary to carry out the provisions of this
chapter or chapter 90.56 RCW.”

5 (emphasis added). The Washington Supreme Court recognized that the Attorney
6 General does not have common law or implied powers but, rather, must rely on the
7 statutes to determine the scope of his authority. *City of Seattle v. McKenna*, 259
8 P.3d 1087, 1090, 1091 (Wash. 2011). However, the *McKenna* court went on to
9 uphold Washington courts’ broad interpretation of RCW 43.10.030(1) which “grants
10 the attorney general discretionary authority to act in any court, state or federal, trial
11 or appellate, on ‘a matter of public concern,’ provided there is a ‘cognizable
12 common law or statutory cause of action.’” *Id.* at 1092.

13 The State is alleging that Defendants’ activities and permit violations degrade
14 the environment and the water quality of numerous creeks and rivers within the
15 state, thereby making this a matter of public concern affecting the people of the state
16 of Washington. *See* State Complaint at 2, 9–10 (“These harms adversely affect
17 Washington and its residents by contaminating numerous waters in and around the
18 Buckhorn Mine site.”). The fact that Ecology is not named as Plaintiff is neither
19 dispositive of the state law claim, nor unusual. *See, e.g., Washington v. Brouillette*,
20 No. 08-cv-05085-RMP.

1 To the extent Defendants' motion can be construed to argue that Ecology's
2 involvement in this matter precludes the State's federal citizen-suit under the Clean
3 Water Act, the Court will not consider the issue which has not been appropriately
4 raised or briefed at this time. However, the Court finds that Defendants' instant
5 motion to dismiss the State's claim under Chapter 90.49 RCW fails because the
6 Attorney General is authorized to bring suit for alleged violations of the Washington
7 Water Pollution Control Act on behalf of the people of Washington.

8 Accordingly, **IT IS HEREBY ORDERED** that Defendants' Motion to
9 Dismiss, **ECF No. 18** is **DENIED**.

10 **IT IS SO ORDERED.** The District Court Clerk is directed to enter this
11 Order and provide copies to counsel.

12 **DATED** October 5, 2020.

13
14 *s/ Rosanna Malouf Peterson*
15 ROSANNA MALOUF PETERSON
16 United States District Judge
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